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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 191

HENRIETTA FIRST MOON, APPELLANT

v.

STARLING WHITE TAIL AND THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR APPELLEES

OPINION BELOW

The opinion below is not reported but appears at R. 14–16.

JURISDICTION

The decree to be reviewed was entered August 5, 1924. (R. 13.) Appeal was taken September 22, 1924. (R. 17.)

This case is here on direct appeal, under Section 238 of the Judicial Code, from a decree dismissing appellant's bill for want of jurisdiction. It appears from the opinion, the decree (R. 13), and the order allowing appeal (R. 17), that the sole question determined was that the District Court was without jurisdiction of the cause, and hence the case seems to be one in which direct appeal is au-

thorized, and the record sufficiently presents the question. *United States* v. *Larkin,* 208 U. S. 333; *McAllister* v. *Ches. & Ohio Ry. Co.,* 243 U. S. 302, 305.

STATEMENT

The bill seeks a review in the Federal court of a decision and determination of the Secretary of the Interior of the question who are the heirs, and entitled to share in the allotment and inherited lands, of Little Soldier, a deceased Ponca Indian. The lands involved are those allotted to Little Soldier and those inherited by him, all of which were held under trust patents issued under the so-called General Allotment Act. (R. 1-7.)

The appellant seeks to obtain recognition of her asserted rights to a half interest in this property as a widow of said Little Soldier, and a decree setting aside the decision of the Secretary of the Interior in so far as it determines that appellee Starling White Tail is entitled to a half interest in the estate and excludes appellant from participation therein.

There does not appear to be any contention as to the correctness of the facts found by the Secretary of the Interior in the heirship proceeding.

It appears that Little Soldier married according to tribal custom Henryetta First Moon and lived with her until about January 1, 1915, when he commenced living with Alice Eagle White Tail, and they a few months later were married by ceremony and lived together as man and wife until Little

Soldier's death in 1919. Alice survived him but a few weeks and left as her heir her son, appellee Starling White Tail, who was adjudged by the Secretary of the Interior to be one of the heirs of allottee Little Soldier and entitled to a half interest in his estate.

It further appears that after vain attempts to break up during their incipiency the relations between Little Soldier and Alice, Henryetta First Moon attempted to divorce Little Soldier by suit in the State Court but the action was dismissed for want of jurisdiction. About two years ~~later~~ after Little Soldier's marriage to Alice, Henryetta married one Buffalo Chief and lived with him until his death.

The Secretary held that the separation of Little Soldier and Henryetta constituted an Indian custom divorce, that Little Soldier considered himself divorced and free to enter into the marriage relation with Alice White Tail and that she and not Henryetta First Moon was his wife at the time of his decease and entitled to share in his estate, as his widow. (R. 7–11.)

SUMMARY OF ARGUMENT

I. The Secretary of the Interior was by law given exclusive jurisdiction to determine heirship in cases of this kind and his decision and finding are under the statute made final and conclusive. The courts are therefore without jurisdiction to reexamine.

II. The United States had not given its consent to be sued and the court in any event was not authorized to entertain a suit against it.

ARGUMENT

I. The Secretary of the Interior was by law given exclusive jurisdiction to determine heirship in cases of this kind and his decision and finding are under the statute made final and conclusive. The courts are therefore without jurisdiction to reexamine

The authority under which the Secretary of the Interior proceeded in the determination of who were the heirs of Little Soldier is contained in the Act of June 25, 1910, c. 431, 36 Stat. 855, Sec. 1, which reads in part as follows:

> That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.

Considering the language alone, it is clear that by this legislation the Secretary of the Interior was made the sole judge of heirship, and constituted the exclusive tribunal in such matters. If his determination was to be subject to review by the courts, then the words " his decision thereon shall be final and conclusive " mean nothing and have no office.

The question presented here is settled by previous decisions of this Court.

In *Hallowell* v. *Commons,* 239 U. S. 506, this Court construed Section 1 of the Act of June 25, 1910, *supra,* and said (pp. 508, 509):

> By the act of June 25, 1910, c. 431, 36 Stat. 855, it was provided that in a case like this of the death of the allottee intestate during the trust period the Secretary of the Interior should ascertain the legal heirs of the decedent and his decision should be final and conclusive; with considerable discretion as to details. This act restored to the Secretary the power that had been taken from him, by acts of 1894 and February 6, 1901, c. 217, 31 Stat. 760. *McKay* v. *Kalyton,* 204 U. S. 458, 468. It made his jurisdiction exclusive in terms, it made no exception for pending litigation, but purported to be universal and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States. * * * the reference of the matter to the Secretary * * * takes away no substantive right but simply changes the tribunal that is to hear the case. In doing so it evinces a change of policy, and an opinion that the rights of the Indians can be better preserved by the quasi-paternal supervision of the general head of Indian affairs. * * *
>
> There is equally little doubt as to the power of Congress to pass the act so construed. We presume that no one would question it if the suit had not been begun. * * * In any event the rights of the In-

> dians in this matter remained subject to such control on principles that have been illustrated in many ways. See *Tiger* v. *Western Investment Co.*, 221 U. S. 286; *Hallowell* v. *United States,* 221 U. S. 317.

This was followed by *Lane* v. *Mickadiet,* 241 U. S. 201, wherein it was said (p. 209):

> The words "final and conclusive" describing the power given to the Secretary must be taken as conferring and not as limiting or destroying that authority. In other words, they must be treated as absolutely excluding the right to review in the courts, as had hitherto been the case under the act of 1887, the question of fact as to who were the heirs of an allottee, thereby causing that question to become one within the final and conclusive competency of the administrative authority.

See also *Mickadiet* v. *Fall,* 258 U. S. 609.

In *United States* v. *Bowling,* 256 U. S. 484, the question was whether the Act covered cases where the lands were held under fee patents but restricted as to alienation, as well as lands held under trust patents. It was held to apply to both, and it was said (p. 487):

> As respects both classes of allotments—one as much as the other—the United States possesses a supervisory control over the land and may take appropriate measures to make sure that it inures to the sole use and

> benefit of the allottee and his heirs throughout the original or any extended period of restriction. As an incident to this power Congress may authorize and require the Secretary of the Interior to determine the legal heirs of a deceased allottee and may make that determination final and conclusive.

But if the question were not foreclosed by these decisions, the same conclusion would be impelled for the following reasons:

1. By Section 5 of the General Allotment Act (February 8, 1887, c. 119, 24 Stat. 389; U. S. Comp. Stat. Ann. 1916, Sec. 4201), patents to allotments are to be issued in the name of the allottees,

> which patent shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs * * * and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever * * *.

By Section 1 of the Act of June 25, 1910, *supra*, it is provided that upon the Secretary's finding of heirship, if he decides the heir or heirs competent he may in his discretion cause such lands to be sold;

that if he find that the lands of the deceased allottee are capable of partition to advantage of the heirs, he may cause the shares of such as are competent to be set aside and patents in fee issued to them therefor. Further, that the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent, *as their respective interests shall appear.*

In view of the powers thus conferred upon the Secretary, it becomes clear why the Secretary's finding as to who are the heirs of a deceased allottee must be considered final and conclusive. If his decision could be attacked and reviewed in a court, then the utmost confusion would arise; a different conclusion by the court would result in upsetting titles given under sales made as authorized by the Act; under partitions made by the Secretary; and also under patents in fee to allotments issued under Section 5 of the Allotment Act at the expiration of the trust period to those whom the Secretary had determined to be the heirs of the various allottees.

Such a situation would be intolerable.

2. The other reason is that Congress meant by the Act of June 25, 1910, that recourse to the courts should not be had to review the Secretary's finding of heirship. This is made manifest by the history of the legislation. When the bill which resulted in

that Act was before the House of Representatives, the following occurred:

> Mr. FITZGERALD. Mr. Chairman, I want to call the gentleman's attention there to section 1, where it provides that the determination of the Secretary of the Interior as to who the heirs of any Indians are is conclusive.
>
> Mr. BURKE (who was in charge of the bill for the committee). I will say to the gentleman that that is in the law of 1906 and was put in the law of 1908. It was put in there for this purpose. It was to settle title, so that its finality could never be questioned for the purpose of affecting its marketability. It simply leaves any aggrieved person who may be left out in the distribution of an estate a claim to go to Congress, instead of assailing the title. [Cong. Rec., vol. 45, pt. VI, p. 5811.]

There are therefore sound and sufficient reasons for making the Secretary's decision final and conclusive, and that means final and conclusive where it is most likely to be questioned—in the courts. *Pearson* v. *Williams,* 202 U. S. 281, 285. Compare *Work* v. *Rives,* 267 U. S. 175, 182; *Work* v. *Chestatee Co.,* id., 185, 187.

Dixon v. *Cox,* 268 Fed. 285, is relied upon by appellant. In that case the Circuit Court of Appeals for the Eighth Circuit did say in its opinion that the Secretary's decision upon the issue of heirship might be voided by a suit on account of fraud, error

of law, or because there was no evidence to support it. We assert, however, that that decision was out of harmony with the decisions of this Court heretofore cited as well as inconsistent with the reasons for the statute and the intent of Congress in enacting it.

It is asserted that the District Court had jurisdiction of this cause by virtue of the 24th paragraph of Section 24 of the Judicial Code, as amended by the Act of December 21, 1911, c. 5, 37 Stat. 46, which confers jurisdiction upon the District Court—

> Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty,

and specified the effect of a judgment favorable to plaintiff.

This paragraph is merely a codification of the Act of August 15, 1894, c. 290, 28 Stat. 305, as amended by the Act of February 6, 1901, c. 217, 31 Stat. 760. U. S. Comp. Stat. Ann. 1916, Sec. 4214.

We assert that this paragraph and this law never did apply to cases such as the instant one, because, we think, the language of the Acts of 1894 and 1901 contemplates that the courts shall have jurisdiction over disputes as to whether an allotment shall be made, and not disputes concerning rights in or to allotments already made. Compare *Bond* v. *United States,* 181 Fed. 613, 616; *Pel-Ata-Yakot* v. *United States,* 188 Fed. 387, 388.

But in any event, the contention of the applicability of this paragraph of the Code or of the 1894 and 1901 Acts to this case is disposed of by *Hallowell* v. *Commons, supra,* wherein it was said in the quotation we have already set out that the Act of June 25, 1910, " restored to the Secretary the power that had been taken from him by acts of 1894 and February 6, 1901 " * * *.

II. The United States had not given its consent to be sued and the court in any event was not authorized to entertain a suit against it.

As the Act of June 25, 1910, repealed the Acts of 1894 and 1901 in so far as heirship proceedings were concerned, if those Acts ever did apply to such proceedings there is no warrant or authority adduced for making the United States a party to this litigation. As it has not given its consent to be sued, and as it can not be sued without its consent, it is clear that the court had not jurisdiction to entertain the suit as against it.

The suit in any event should have been dismissed as to the United States, and this regardless of whether that had been suggested to the District Court, because it is settled that no officer can without authority submit the interest of the United States to any court.

We have not argued the case upon the merits as upon the record the only question open here is that of jurisdiction. *Huntington* v. *Laidley,* 176 U. S. 668, 677; *Reid* v. *United States,* 211 U. S. 529.

CONCLUSION

The decree of the District Court was right and should be affirmed.

Respectfully submitted.

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JANUARY, 1926.

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